STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURRAY, P.J., AND METER and OWENS, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TMANDO ALLEN DENSON,

Defendant-Appellant.
/

Supreme Court
No. 152916

Court of Appeals
No. 321200

Circuit Court
No. 15-032919-FH

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGEMENT APPEALED FROM AND RELIEF SOUGHT

Defendant has filed an Application for Leave to Appeal the Court of Appeals' unpublished decision, affirming his jury conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200). (Appendix 1[1]). This Court directed the Genesee County Prosecuting Attorney to respond, asking the Prosecuting Attorney to pay particular attention to Defendant-Appellant's argument that evidence of a prior act of violence was inadmissible under MRE 404(b). *People v Denson*, order of Michigan Supreme Court, issued June 22, 2016 (Docket No. 152916). (Appendix 2.) Subsequent to Plaintiff-Appellee's filing its Answer to Defendant's Application, the Court has directed the parties to file supplemental briefs addressing: (1) whether the trial court erred when it admitted evidence under MRE 404(b) of the circumstances underlying defendant's 2002 conviction for assault with intent to do great bodily harm and, if so, (2) whether the error was harmless. *People v Denson*, order of Michigan Supreme Court, issued November 23, 2016 (Docket No. 152916) (Appendix 5).

Defendant's conviction arose from an incident that occurred at his family's home in the City of Flint on October 22, 2012. Defendant discovered the victim, 17-year-old Shamark Woodward, and Defendant's 15-year-old daughter, Diamond Denson, together in Diamond's bedroom in a state of partial undress. Defendant reacted swiftly and violently, punching and kicking and knocking Woodward around in what Defendant described as an exercise of defense of his daughter and of himself. Woodward and Defendant gave different accounts of what happened next, but the result of the encounter was Defendant's hands and forearms were injured and

[1] Appendices 1 through 4 are attached to Plaintiff-Appellee's Answer to Defendant's Application for Leave to Appeal. Appendices 5 and 6 are attached to this Supplemental Brief.

Woodward was battered by fists, shod feet, a lamp that was broken over his head, and several long knife wounds carved into his back, arms, legs, and shoulders, requiring over 20 stitches and staples to close. Whether Defendant's assault began as a justified attack under a reasonable belief that it was necessary to keep Woodward from assaulting Diamond or Defendant, the knife wounds were unexplained by Defendant's description of events and consistent with Woodward's claim that they were a means of retribution against him and Defendant's act to teach a lesson to his daughter.

(1) The facts underlying Defendant's previous assault of another individual in 2002 were admitted under MRE 404(b) after pretrial notice and argument during trial, following the close of Plaintiff's proofs. While the trial court did not make a clear record of its analysis and decision to admit the evidence, the result that the evidence was admissible was not an abuse of discretion. The evidence of Defendant's prior act of over-reacting in a sudden and violent manner to a confrontational situation was relevant to his intent in causing injury to Woodward in the present circumstances. Not only was the evidence relevant to proving Defendant's intent to commit great bodily harm, it was even more material and probative to negate Defendant's alleged intent to exercise reasonable force in self-defense. This permissible use of the prior acts evidence was not substantially outweighed by the danger of unfair prejudice that may have arisen out of any misconception or consideration by the jury that Defendant must have committed the present act as a result of a trait of character.

(2) Even if the evidence was admitted in error, the result did not affect the outcome of Defendant's trial and Defendant's conviction should be affirmed. With or without the other acts evidence, the version of events alleged by Defendant and his daughter could not account for the straight laceration knife wounds suffered by Woodward, particularly carved across his back. (See Appendix 6). And there is no plausible way that these injuries would have occurred during the

affray described by Defendant, nor would they have been caused in any way short of excessive force used not in self-defense but arising out of anger or retribution. The inference would have been the same with or without the other acts evidence. Therefore, introduction of the evidence did not affect the outcome and any error was harmless.

Accordingly, for the reasons discussed *infra*, the People of the State of Michigan respectfully request this Honorable Court deny leave to appeal because the Court of Appeals' decision was correct, the issues presented in Defendant-Appellant's Application lack merit and are not issues that need to be addressed by this Court and because Defendant received a fair trial.

SUPPLEMTAL STATEMENT OF QUESTIONS PRESENTED

I. Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible when relevant to establish any purpose other than that the defendant committed the present crime arising from a propensity to commit such acts. Were defendant's prior act of anger and use of excessive force admissible under MRE 404(b) as material and relevant to prove that the motive, intent and modus operandi related to defendant's claim of self-defense were not believable and evidence of defendant's bad temper was more consistent with the victim's testimony that defendant reacted in anger and assaulted him with excessive force in this case?

Defendant-Appellant:	answers this question, "No."
Plaintiff-Appellee:	answers this question, "Yes."
The Court of Appeals:	answers this question, "Yes."
The Trial Court:	answers this question, "Yes."

II. If the trial court erred in admitting evidence under MRE 404(b) of the circumstances underlying Defendant's 2002 conviction for assault with intent to do great bodily harm, was the error harmless because Defendant cannot establish that, more probably than not, the trial court's evidentiary ruling on this matter affected the outcome of his trial?

Defendant-Appellant:	answers this question, "No."
Plaintiff-Appellee:	answers this question, "Yes."
The Court of Appeals:	did not answer this question.
The Trial Court:	did not answer this question.

SUPPLEMENTAL STATEMENT OF FACTS[2]

I. Facts

Plaintiff-Appellee incorporates by reference the Counter-Statement of Facts presented in its Answer in Opposition to Defendant's Application for Leave to Appeal. The following facts are those pertinent to the issues addressed in this supplemental brief.

Victim Shamark Woodward's Testimony

On the evening of October 22, 2012, 17-year-old Shamark Woodward II received a text from his 15-year-old girlfriend, Diamond Denson, inviting him to come over to her house at 2111 Illinois Avenue, Flint, Michigan. (TT I, 136-140). Woodward walked to Diamond's house where they talked to each other in the living room, followed by kissing and hugging. (TT I, 140-141). When they heard a car pull into the driveway, which Diamond said was her dad, Diamond suggested that they both go upstairs to her room where they sat around and talked some more. (TT I, 141-144; TT II, 28-29). Woodward testified Diamond stated that they should "do it," and they started to get intimate with one another (which he described as hugging and kissing), and both had taken off their pants and underwear. (TT I, 144-145; TT II, 8). They did not have sexual intercourse. (TT II, 8). Diamond never told Woodward to stop doing what he was doing and she never screamed out for help from her father. (TT II, 52). Both were half naked when they heard the doorway to the stairs open and heavy footsteps as Diamond's father, Defendant Tmando

[2] The People abbreviate and cite the transcripts in this case within this Brief as follows:
Motion hearings: (date) Hrg Tr.
Trial transcripts: TT I – Trial Volume I, January 22, 2014; TT II – Trial Volume II, January 23, 2014; TT III – Trial Volume III, January 24, 2014; TT IV – Trial Volume IV, January 28, 2014; TT V – Trial Volume V, January 29, 2014; TT VI – Trial Volume VI, January 30, 2014; TT VII – Trial Volume VII, January 31, 2014; TT VIII – Trial Volume VIII, February 3, 2014.
Sentencing Transcript: S.

Denson, came up the stairs. (TT I, 145, 148). According to Woodward, Diamond jumped up and put on her bottoms while he sat there in the middle of the room in shock. (TT I, 145).

Woodward testified that Defendant first asked him his name and how old he was and then, after Woodward answered him, Defendant struck Woodward in the side of the head with his fist. (TT I, 150-151). Woodward fell onto the bed and Defendant continued to pummel his head with his hands and stomped on Woodward's head with his foot. (TT I, 151). Defendant then grabbed a lamp and bashed Woodward's head several times until the lamp shattered, causing a bleeding gash in Woodward's head. (TT I, 151, 157). Defendant threw the lamp at Woodward and next tried to hit him with a chair. (TT I, 151). When Diamond tried to intervene, Defendant pushed her back and struck her. (TT I, 151).

At that point, Defendant spoke to someone on his cell phone, after which he had Woodward and Diamond take the rest of their clothes off and took pictures of them. (TT I, 152-153). When Diamond protested, Defendant threatened to kill Woodward if she didn't obey. (TT I, 152). Defendant then made a second phone call and threatened Woodward that if he moved, he would kill him. (TT I, 153). Defendant left the room and returned a few minutes later with an ultimatum: he could either deal with Defendant's "homeboys," who would probably kill him, or he could deal with Defendant. (TT I, 153). Woodward chose to deal with Defendant, who had him sit in the corner of the room facing the corner. (TT I, 153). Defendant pulled out two knives and slashed Woodward repeatedly across his back, shoulders, and legs. (TT I, 153, 157; TT II, 79-80). During the ordeal, Defendant told Woodward to kiss his boot, and when he did so Defendant kicked him in the face. (TT I, 153-154). Defendant then had Woodward gather his clothing and he walked him out of the house. (TT I, 155). Once outside, Defendant told Woodward that he did all that to him to teach his daughter a lesson. (TT I, 155).

Woodward testified that during this entire confrontation, he did not make any moves toward Diamond nor did he fight back against Defendant. (TT I, 156, 160). Woodward denied having a weapon at any time and denied Defendant's version of events that entailed him running down to the kitchen and obtaining a knife from the kitchen or throwing anything at Defendant. (TT I, 160; TT II, 10). Woodward removed his shirt in court and showed his scars to the jury, including the knife cuts across his back, on his head, and on his leg. (TT I, 160-164).

When Woodward arrived home, he told his brothers what had happened and they took him to the hospital. (TT II, 6-7). He was in shock and felt dizzy. (TT II, 7). Woodward received eight staples in his head, one stitch in one scar, seven in another, and 21 across his lacerations. (TT II, 8). The next morning, Woodward's mother, Anoopa Woodward, took photographs of Woodward's injuries. (TT II, 13). Photos of Woodward's face, head, back, leg, shoulder, ear, neck and arm—showing injuries inflicted by kicking, cutting, slashing and being struck by a shoe—all were admitted into evidence. (TT II, 13-19) (See photographs admitted at trial as exhibits 3, 4, 5, and 8 (attached as Appendix 6).

Victim's Medical Treatment

Dr. Faisal Mawri testified at trial regarding the treatment of Woodward's injuries based on his own personal observations of Woodward at the hospital on the night of the incident. (TT II, 81). When he approached Woodward, he appeared to be dazed and in a state of shock, with multiple lacerations on his body and with a huge laceration on his scalp. (TT II, 85-90). He watched as Woodward's wounds were cleaned, sutured and stapled. (Id.). Dr. Mawri observed a huge wound on the back of Woodward's skull that required seven staples to close. (TT II, 91). He saw a 5 centimeter laceration wound on Woodward's back that required 9 sutures to close. (Id.). He observed another 8 centimeter laceration, which he described as a huge cut, on

Woodward's right arm that took 5 sutures. (Id.). In all, Woodward's treatment—which Dr. Mawri observed—required a total of 15 sutures and 7 staples. (Id.).

Dr. Mawri testified that based on his observations, Woodward's injuries were of the type that could seriously harm the health or function of the body. Particularly, if the wounds were not cleansed and sutured very quickly, they could have secondary infections and lead into other complications, including inflammations of the bone. (TT II, 92-93). Dr. Mawri testified that Woodward's chart indicated that he gave a medical history of being an assault victim, assaulted by a male, and that he was struck with fists, a chair and a kitchen knife. (TT II, 94). The lacerations noted in the chart were consistent with those observed and testified to by Dr. Mawri. (Id.). Dr. Mawri concluded his direct examination by agreeing that the lacerations on Woodward's back and arms were consistent with a sharp object, such as a knife. (TT II, 95-96).

Observations of Victim's Injuries

Shamark Woodward's mother, Anoopa Woodward, testified that on October 22, 2012, she went to Hurley Hospital and visited Woodward in the emergency room. (TT II, 120-121). His face was all bruised and swollen and his head was gashed open on top. (TT II, 121). She observed cuts on his arms and back, scrapes on his legs, cuts on his hands, and bruising about his face mouth and one side of his head. (TT II, 122). He did not have any cuts on the front of his body. (TT II, 123).

Officer Wesley Suttles spoke to Woodward at the hospital on October 22, 2012. (TT II, 158). Officer Suttles noted that the right side of Woodward's face was red and swollen, and he observed two long vertical lacerations on Woodward's back and a small laceration on his head. (TT II, 169).

Diamond Denson's Testimony

Diamond Denson admitted that she texted Woodward and invited him over to her house on October 22, 2012. (TT III, 44-45). She invited Woodward into the house and they sat talking on the living room couch while her brothers were downstairs. (TT III, 46). She was not supposed to have a boy over while her parents were gone, so when she heard her aunt's car and saw Defendant and her aunt outside, she told Woodward to go upstairs to her bedroom. (TT III, 42, 47). She closed her bedroom door and went downstairs to let Defendant into the house. (TT III, 48). She said she left Defendant in the basement watching television with her brothers and joined Woodward upstairs in her bedroom. (TT III, 49-50). According to Diamond, Woodward took off his jeans and his long-sleeved shirt because he was hot. (TT III, 53-54). Woodward was still wearing black basketball shorts and a white t-shirt. (TT III, 82).

At that point, her story differed from Woodward's testimony. Diamond testified that as she was moving across the room to turn off a lamp that was on a bed-side table, Woodward tripped her and she fell into the wall, making a loud noise and putting a hold in the drywall. (TT III, 55-56; 75-76, 168). She sat back down on the floor next to Woodward and he kissed her, pulling her onto her mattress. (TT III, 82). Woodward attempted to pull down her jogging pants and she started telling him to stop. (TT III, 82-83). When Woodward refused to stop, she claims she yelled "stop, my dad is downstairs." (TT III, 84). She then heard the door to the stairs open and loud footsteps as Defendant came up and pulled Woodward off of her. (TT III, 85). She said Defendant and Woodward started fighting, hitting, pushing, and wrestling. (TT III, 85-86). At one point, Woodward got away and ran downstairs and Defendant gave chase. (TT III, 87, 90). A little while later, Woodward ran back upstairs followed by Defendant and she heard Woodward ask if he could go home. (TT III, 91). She testified that she did not hear Defendant ask Woodward to kiss his shoe,

did not see Defendant kick him in the face, did not see Defendant beat Woodward with his shoe, and did not see Defendant with a knife. (TT III, 92). Once upstairs, Defendant threw Woodward's clothes to him and they walked out of the house. (TT III, 92).

On cross examination, Diamond agreed that Woodward is not a bad guy and she did invite him over because he was her boyfriend. (TT III, 115). He was a nice boy and she loved him, and she still loved him even after the incident. (TT III, 115, 117). She also agreed that Defendant has a temper. (TT III, 114). During the incident, she never saw Woodward with a knife. (TT III, 117). She denied seeing any cuts on Woodward's back, arm, or shoulder and while she saw him bleeding, she denied seeing blood all over him. (TT III, 143-144). Diamond testified that she didn't go to the police station to report what occurred until after her father was arrested. (TT III, 144, 162). And each time she spoke with police about the incident, her mother was there with her. (TT III, 162).

Diamond agreed that after Defendant pulled Woodward off of her, she was safe. (TT III, 157). After that point, there was no reason for Defendant to hit Woodward in the head with a lamp, hit him with a shoe, cut him with a knife, or humiliate them by taking naked photos of them. (TT III, 158-159). She testified that Defendant did not shove her and slap her while Woodward was in the room. (TT IV, 6). She didn't know whether Defendant stomped on and kicked Woodward, but she denied that Defendant hit him with a lamp. (TT IV, 9).[3] Her Facebook messages with Woodward from the day after the incident were read into the record and admitted as Exhibit 25. (TT IV, 13-18). Among other things, Woodward messaged her that, "I was never scared, just didn't want to get shot or fight him back, or something worse." (TT IV, 17).

[3]This is contrary to Defendant's own testimony, during which he admitted to shattering a lamp over Woodward's head. (TT V, 91-92, 97).

Defendant's Testimony

Defendant testified at trial, giving a different version of what occurred. His version was largely supported by Diamond's testimony, with a few key differences. On October 22, 2012, Defendant was in the basement watching a football game on tv with his sons when he heard a loud noise and went upstairs to investigate. (TT V, 36-39, 83). He then heard Diamond yell "stop," "no," and "what are you doing, my daddy is downstairs." So he ran up the stairs to her bedroom and saw Diamond on the floor and Woodward leaning over her wearing no pants and with his hand inside Diamond's pants. Defendant yelled and began hitting Woodward. They tussled initially before Woodward broke loose and ran downstairs, followed by Defendant. They tussled again in the kitchen and Woodward threw a glass at Defendant, striking him in the hand and causing cuts and a broken finger. (TT V, 40-44, 48-50, 89-92, 97-102, 123). Woodward then ran back upstairs and stated, "just give me my clothes." (TT V, 51-52). At that point, at Defendant's questioning, Woodward gave his name and told him he was 17 years old. (TT V, 53). Defendant gave Woodward his clothes back and Woodward left the house. (TT V, 54-57).

Defendant testified that he went to the Flint Police Department that night, but it was closed. (TT V, 61-62). He tried again to make a report on October 24, 2012, when he learned that the police were looking for him so he turned himself in. (TT V, 67-68, 86). Defendant reported receiving a broken finger, 6 puncture wounds to his right palm, cuts to his biceps, forearm, and wrist, and abrasions, swelling and bruising. (TT V, 69-71, 95-96). Defendant denied telling Diamond or Woodward to undress, taking pictures of them nude, threatening to have Woodward taken care of by his homeboys, or using a knife on him. He testified that he honestly believed Diamond was being sexually assaulted and he was merely protecting his daughter and sons from Woodward, who had a knife. (TT V, 77-79, 80).

On cross examination, Defendant acknowledged that when he went in to speak to his parole officer[4] Jerry Dennis on October 24, 2012, he did not know that he was going to be arrested. (TT V, 86-87, 105). In fact, Defendant testified that he didn't want police contact because he thought he might be in trouble. (TT V, 117). He went into Mr. Dennis's office to explain to him what had occurred and he brought with him a document entitled, "Affidavit."[5] (TT V, 87, 105).

Defendant testified that when he saw Woodward in the room with his daughter he probably kicked him and stomped on him. (TT V, 90-91). He is sure that he beat Woodward with his fists and broke a lamp over Woodward's head. (TT V, 91-92, 97). When asked if he beat Woodward with a shoe, defendant testified that "I don't know what all I beat him with." (TT V, 91).

Rebuttal Testimony

Defendant's Statement to Jerry Dennis

Jerry Dennis testified regarding his contact with Defendant related to the incident involving Defendant and Shamark Woodward. (TT VI, 38). Mr. Dennis testified that he works in law enforcement in Genesee County, and as far as he knows, Defendant first called him on October 24, 2012 to tell him about the incident with Woodward. (TT VI, 39). He told Defendant to come in to see him, but he did not tell Defendant he was going to arrest him. (TT VI, 39-40). Defendant did not surrender himself or turn himself in, but Mr. Dennis did arrest him after he reported what had occurred. (TT VI, 40).

Defendant admitted to Mr. Dennis that he had kicked Woodward in the back of the head and then in the face. (TT VI, 69). He said Woodward had thrown a glass of water in his face, and

[4] The fact that Defendant was on parole and that Jerry Dennis was his parole officer were not disclosed to the jury.

[5] This affidavit is the document that Defendant has attached to various pleadings on appeal and is attached as Appendix 3 to this Answer in Opposition to Application for Leave to Appeal.

Defendant admitted that he shattered a lamp over Woodward's head. (TT VI, 70). Defendant told him that Woodward then ran downstairs where he grabbed a steak knife. (TT VI, 70). Defendant also grabbed a steak knife and chased Woodward back upstairs. (TT VI, 70). Woodward threw his knife at Defendant, and Defendant threw his knife back at Woodward. (TT VI, 70-71). The fight continued upstairs until Woodward slid down onto the floor and Defendant told him not to move. (TT VI, 71). Defendant did not report to Mr. Dennis that he had been injured and he did not see any evidence of injury. (TT VI, 43). Defendant did not call the police, because he didn't want police contact, so he called his sister who came over immediately. (TT VI, 71). When his sister arrived, Defendant escorted Woodward out of the house, checked on his daughter, and then went back to his apartment with his sister. (TT VI, 72). Defendant did not tell Mr. Dennis that his daughter was all panicked and unable to talk nor did Defendant say anything about being injured himself. (TT VI, 43, 72). Had Defendant mentioned that he was injured, Mr. Dennis would have noted it in his report and would have checked to see if there were injuries. (TT VI, 73). He did not see any injuries to Defendant. (TT VI, 73).

II. Verdict and Sentence

The jury convicted Defendant of assault with intent to do great bodily harm less than murder, (TT VIII, 4), and the trial court sentenced Defendant to serve 60 months to 240 months in prison, (S, 29).

Additional pertinent facts and procedural history will be discussed in the body of the People, Plaintiff-Appellee's, Supplemental Brief, *infra*, to the extent necessary to fully advise this Court as to the arguments raised on appeal.

ARGUMENT

I. Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible when relevant to establish any purpose other than that the defendant committed the present crime arising from a propensity to commit such acts. Admission of defendant's prior act of anger and use of excessive force were admissible under MRE 404(b) as material and relevant to prove that the motive, intent and modus operandi related to defendant's claim of self-defense were not believable. Defendant's bad temper was corroborative of Woodward's testimony that defendant reacted in anger and assaulted him with excessive force in this case.

a. Standard of Review

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014); *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). A trial court's decision whether a rule of evidence precludes admission of evidence, which involves a preliminary question of law, is reviewed *de novo*. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). A trial court necessarily abuses its discretion if the admission of evidence constitutes error as a matter of law. *Bynum*, 496 Mich at 623. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

b. Introduction

The court of appeals considered this issue and held that the trial court acted within its discretion when it admitted the evidence regarding Defendant's 2002 assault of Tyrone Bush, which was used to contradict Defendant's self-defense theory. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200). (Appendix 1.) As the court of appeals found, these facts "had significant probative value toward

contradicting the significant testimony that defendant introduced in support of [his] primary defense theory." *Id*., slip op at 5. This "contradiction of the self-defense theory constituted a proper, noncharacter purpose for admission under MRE 404(b)." *Id*. The People would submit that the court of appeals was correct and admission of the evidence was not an abuse of discretion. In addition to the reasoning of the court of appeals, the People additionally argue that Defendant admitted the assault upon Woodward, but he challenged the intent and claimed a justification. The evidence was admitted to rebut Defendant's assertion that his use of force was necessary and not excessive. Therefore the prior example of Defendant's bad temper and reaction to stressful confrontation was relevant to determine his intent in committing the assaultive actions against Shamark Woodward.

c. Argument

Pursuant to MRE 404(b), "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Although other-acts evidence may not be used to demonstrate a person's character or propensity to commit a crime, it may be admissible for other purposes, including, for example, proof of motive or intent. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To introduce evidence under MRE 404(b):

> First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402 . . . ." Third, the probative value of the evidence must

> not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (citations omitted).]

Under this framework, the prosecutor "bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity." *Mardlin*, 487 Mich at 615, 790 NW2d 607; *Crawford*, 458 Mich at 385. A mere "mechanical recitation" of a proper purpose does not, however, justify admission of other-acts evidence. *Crawford*, 458 Mich at 387. Rather, the prosecutor also bears the burden of showing that the evidence is logically relevant to a proper purpose. *Mardlin*, 487 Mich at 615.

To be relevant, evidence must be both material and probative. *Crawford*, 458 Mich at 388. To be material, the evidence must relate to "any fact that is of consequence to the action." *Id.* (citation omitted). Whether the evidence also has probative value depends on "whether the proffered evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 389-390, quoting MRE 401. The relevance of the evidence depends to varying degrees on the similarity between a defendant's prior bad acts and current offense. See *Id.* at 395-396 & n 13. "Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission." *Mardlin*, 487 Mich at 622. For example, "[w]hen other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *People v VanderVliet*, 444 Mich 52, 79-80; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In other words, "mere similarity" between the acts will suffice when the other-acts evidence is offered to establish an actor's intent. *Sabin (After Remand)*, 463 Mich at 64 (citation omitted).

i. The evidence was offered for a non-propensity purpose that was relevant

Although not well-defined by the prosecutor or the trial court, the other acts evidence admitted in this case was offered for the purpose of establishing Defendant's motive and intent in committing assault with intent to commit great bodily harm and, more significantly, in his lack of intent to act with necessary and reasonable force in defense of others or in self-defense.

To establish the crime of assault with intent to commit great bodily harm less than murder, the prosecution must prove beyond a reasonable doubt that the defendant had a specific intent to "do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (citations omitted).

To assert self-defense to justify the use of non-deadly force a defendant must present some evidence that "*he or she honestly and reasonably believe[d] that the use of that force [wa]s necessary* to defend himself or herself or another individual from the imminent unlawful use of force by another individual. MCL 780.972(2) (emphasis added). An individual acting in self-defense is only entitled to use that level of force necessary to protect themselves. "'When the steps [an individual] takes are reasonable, he has a complete defense to such crimes against the person as ... assault and battery and the aggravated forms of assault and battery....'" *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), quoting 2 LaFave, Substantive Criminal Law (2d ed), § 10.4(a), pp 143–144. "A defendant is not entitled to use any more force than is necessary to defend himself." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). "[A]n act committed in self-defense but with excessive force ... does not meet the elements of lawful self-defense." *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990).

When a defendant presents evidence that he acted in self-defense, the prosecution "bears the burden of disproving it beyond a reasonable doubt." *People v James,* 267 Mich App 675, 677; 705 NW2d 724 (2005).

The people filed a proper notice under MRE 404(b) on May 9, 2013, indicating that the prosecutor intended to introduce the facts underlying defendant's prior 2002 conviction for assault with intent to commit great bodily harm "[f]or the purpose of proving absence of self-defense or defense of others, absence of mistake, modus operandi, scheme plan and knowledge." The prosecutor did not, however, introduce this evidence during his case in chief. The prosecutor presented evidence through the victim as to what occurred and though a number of witnesses as to his injuries and how they were likely inflicted. The acts underlying Defendant's 2002 conviction were not offered to prove that Defendant committed the act of assault upon the victim with the intent to do great bodily harm to him.

On January 23, 2014, the second day of trial, after the people rested, defendant made an objection on the record to the introduction of any evidence of defendant's prior criminal record. (TT II, 144). Defendant objected that the evidence was not relevant and would be more prejudicial than probative. (Id.). The prosecutor explained the materiality and relevance of the evidence of Defendant's prior actions—not the fact of his conviction. (TT II, 145-46). The probative value lay in rebutting Defendant's contention that he acted purely in defense of himself or others. At trial, defendant was claiming that he was acting in self-defense or defense of his children. The evidence that defendant is a person quick to anger, who loses control and uses excessive force when faced with confrontation is contrary to his asserted intention and motive in the actions taken in the present case. It was not an argument that defendant has committed a crime in the past, that he is of bad character, and thus he must have committed the present crime. Nor was it an argument that

defendant must have committed the particular acts alleged in this case—those were already proven during the People's case-in-chief. Instead, the evidence was offered as relevant to Defendant's claimed motivation and intent as relevant to his claim of self-defense.

The trial court ruled that the facts of the previous assault that arose from an argument were admissible as evidence that defendant "has some kind of temper or that he had bad judgment or something like that." (TT II, 149). The prosecutor was precluded from mentioning that defendant was still on parole at the time of the present offense or that defendant was convicted as a result of the prior act. (TT II, 148-49). Although the trial court did not compare the similarity of the prior acts to the facts at issue in the present case, the acts do share a general similarity as required to establish logical relevance. *VanderVliet,* 444 Mich at 79-80; *Sabin (After Remand),* 463 Mich at 64. In both circumstances, Defendant was involved in a confrontation with another person. Defendant confronted Tyrone Bush about owing him money and argued with him until Mr. Bush attempted to retreat into his home. At that point, Defendant reacted with a sudden and violent use of excessive force and shot Mr. Bush. Defendant is alleged to have used force against Shamark Woodward in what he claims to be an attempt to protect his daughter and then himself. Defendant went beyond the use of force necessary and proceeded to carve long, straight lacerations into Woodward's arms, shoulders, leg and back. And, contrary to Defendant's claim that he was simply using the force necessary to defend his daughter and himself, Defendant punched, kicked, and smashed a lamp over Woodward's head. The facts of the assault on Mr. Bush are probative to Defendant's intent as he both inflicted great bodily harm and exceeded the scope of any necessary force in self-defense. Although the trial court should have made that comparison clear on the record, the fact is, the court's conclusion was supported by the evidence. *See People v Biller,* 239

Mich App 590, 595 n 4; 609 NW2d 199 (2000) (court "will not reverse where the trial court reached the right result for a wrong reason").

A major issue of contention between the parties in this case was whether defendant struck, punched, kicked, and stomped Woodward while exercising self-defense or out of anger at Woodward for being alone with defendant's daughter in her bedroom without her father knowing it. A key component of the people's argument was that defendant reacted with a quick temper in anger and swift and excessive force, far beyond any alleged danger posed to his daughter or himself, even if he initially may have felt his daughter was threatened. The evidence showed that defendant: (1) assaulted Woodward because Woodward was being "intimate" with his daughter; (2) threatened to have his "homeboys" handle it (TT I, 154); and (3) used excessive force based on emotion. The evidence was not used to argue that defendant committed the acts alleged in this case because he is a person of bad character or out of a propensity to act in conformity with a character trait, but rather to shed light on the intent with which he acted. Moreover, the evidence corroborates Woodward's testimony of Defendant's sudden and violent actions in the face of Defendant's flat out denial and where defendant, his daughter and wife denied the existence of his violent temper. Whether defendant had a "bad temper" was material and relevant to that factual dispute.

During defendant's case-in-chief, defendant's daughter, Diamond Denson, testified on cross examination that she had a temper and defendant also had a temper. (TT III, 114, 151). And on re-direct, defense counsel emphasized through Diamond's testimony that she did not say she or her father had a "bad" temper, merely that they "have a temper." (TT IV, 20-21). Defendant's wife, Rosemary Denson, testified that defendant did not have a bad temper. (TT IV, 111-112). And defendant denied that he had a bad temper. (TT V, 108, 131). Thus, the facts of the prior act,

that he settled an argument with another man over-reacting with resort to a violent and sudden action, shooting the man in the stomach as the man tried to retreat into the safety of his home, was relevant to the parties' contentions in the present case.

During cross examination of Rosemary Denson, she denied that defendant has a bad temper or easily loses control. In response, the prosecutor asked whether she was aware that defendant, her husband, had gotten into trouble in Detroit and that all her children were aware of that incident. (TT IV, 112). She acknowledged that was true.

When defendant testified, he denied that he lost his temper with Woodward and attacked him out of anger. In fact, defendant claimed he fought Woodward first to protect his daughter, second to defend himself, and third to protect his sons who were in the basement at the time of the incident. On cross examination, the prosecutor established that in the past defendant had a dispute with a man named Tyrone Bush over money that Mr. Bush owed him. Defendant went to Mr. Bush's house and argued with him outside his house. Mr. Bush tried to retreat back into his house and defendant shot him. (TT V, 105-08). Despite admitting these actions, defendant denied that he had a bad temper. (TT V, 108, 131). The evidence was admitted as relevant to establish that in the present case, as in the past, defendant acted with the intent to retaliate in anger against a perceived wrong and not for his stated purpose of defending himself or his family.

ii. Probative value was not substantially outweighed by unfair prejudice

It is true that the trial court did not engage on the record in an MRE 403 balancing test to determine whether the probative value was substantially outweighed by the danger of unfair prejudice. However, while balancing the probative value against unfair prejudice on the record is preferable, it is not required. *People v Gaines*, 306 Mich App 289, 302 n 8; 856 NW2d 222 (2014). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence

will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. Nonetheless, had the trial court engaged in such a discussion, the court would have admitted the evidence, as it did.

Any danger that the jury would convict defendant now because he was a bad person and had committed an assault with a weapon, which force was excessive, did not substantially outweigh the material, probative value that the evidence carried in this case. Defendant presented testimony from his daughter, wife, and himself asserting that he did not have a bad temper and, in fact, only used appropriate force against Woodward to repel a sudden and violent attack against Diamond and himself. Woodward testified that he did not force Diamond to do anything and did not physically oppose defendant, but rather that defendant suddenly and violently attacked him and assaulted Diamond when defendant found them together in Diamond's room. Woodward testified that defendant beat him with fists and kicked him in the head, smashed a lamp over his head and cut him with a knife, even as the 17-year-old victim cowered in the corner of the room. Woodward's injuries were consistent with his version of events and not defendant's. The evidence that defendant has a bad temper and has in the past reacted in a sudden, violent and excessive manner when he feels provoked was relevant to determine defendant's state of mind and *modus operandi*. The probative value was not outweighed by the danger of unfair prejudice and the evidence was properly admitted. It was not an abuse of discretion.

II. If the trial court erred in admitting evidence under MRE 404(b) of the circumstances underlying Defendant's 2002 conviction for assault with intent to do great bodily harm, any error was harmless because Defendant cannot establish that, more probably than not, the trial court's evidentiary ruling on this matter affected the outcome of his trial.

a. Standard of Review

Should this Court find that the other acts evidence was admitted in error, the Court should not reverse defendant's conviction as any error would have been harmless. Defendant cannot establish that, more probably than not, the trial court's evidentiary ruling on this matter affected the outcome of his trial. MCL 769.26; MCR 2.613(A); *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

MCR 2.613(A) states:

> Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

In applying the harmless-error rule, there is a presumption "that a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 491, quoting MCL 769.26. "Evidentiary errors are nonconstitutional." *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). In conducting this inquiry, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. The defendant has the burden to demonstrate that the asserted error "has resulted in a miscarriage of justice." *Id*. (quotation marks and citation omitted).

b. Argument

In this case, even if the jury was improperly informed that defendant has displayed a quick, violent temper in the past, such evidence did not adversely affected the verdict. Any unfair prejudice occasioned by admission of the other acts evidence did not affect the outcome of the proceedings due to the strength of the evidence against Defendant.

Defendant testified along with his wife and daughter alleging that he acted in defense of his daughter and himself. Defendant claimed that he used only that force necessary to repel an attack by Woodward. Woodward testified that Defendant came home and caught him and Defendant's daughter in the midst of being "intimate." (TT I, 144-145, 148). Woodward described in detail how Defendant controlled him and taunted him (TT I, 152-155), kicked him in the face and in the side of the head (TT I, 151, 153-154), struck him with his fists (TT I, 150-151), smashed a lamp over his head (TT I, 151), and then proceeded to use a knife to carve long lacerations into his shoulder, back and legs (TT I, 153), before kicking him out of the house without his phone. Woodward showed the scars on his back to the jury. (TT I, 160-164). Woodward testified that he received 8 staples to close the wounds to his head, and 21 stitches to close the lacerations. (TT II, 8). Woodward identified photos of his injuries taken by his mother after treatment, all of which were admitted into evidence. (TT II, 12-19). Both Woodward's mother and Dr. Mawri testified as to the wounds Woodward suffered as a result of defendant's attack (TT II, 90-91, 95-96, 100-102, 111, 121-123, 140-142), and photos of the cuts were admitted into evidence at trial (Photographs of the lacerations on Defendant's back (Exhibit 3), his right shoulder and arm (Exhibit 5), his left arm (Exhibit 8), and his right leg (Exhibit 4) are attached as Appendix 6). None of these long lacerations consistent with a sharp object such as a knife were to the front of Woodward's body. (TT II, 95-96, 123). These wounds corroborated Woodward's testimony and belied defendant's

and his daughter's version of events. Defendant simply had no explanation as to how Woodward suffered his injuries within the context of Defendant's explanation and claim of self-defense.

Furthermore, defendant's parole officer, Jerry Dennis, testified that defendant admitted kicking Woodward in the back of the head and the face and shattering a lamp over his head. (TT VI, 69-70). Defendant admitted to him that he possessed a knife during the assault (TT VI, 70-71), and defendant's version did not match up with the knife wounds suffered by Woodward. In other words, due to the nature of Woodward's injuries, Woodward's testimony was solidly corroborated and any minor errors by the trial court did not undermine the wide latitude the jury had to either disbelieve defendant and his daughter altogether or to believe defendant initially acted with a belief that defense of his daughter was necessary but carried his use of force well beyond that necessary to repel an attack and intentionally caused great bodily harm to Woodward.

Defendant argues as if the jury's verdict hinged on their belief that he either had a right to self-defense or he did not, and that the claimed errors resulted in the jury's complete belief in Woodward's testimony. But it is equally possible that the jury believed Defendant began to assault Woodward in a lawful exercise of self-defense which evolved into a battery out of rage and resulted in excessive force that was not justified. The jury could have accepted everything Defendant said—and everything that his proposed documentary evidence and additional witness testimony might have provided—but still found due to the unimpeachable physical injuries to Woodward's back that Defendant was guilty of assault with intent to commit great bodily harm.

The jury was free to conclude that the defendant's version of events was not credible. He did not report the alleged assault immediately (TT V, 117; TT VI, 15, 19, 42, 71), nor did his daughter when she spoke to Ofc. Kendall (TT VI, 88-81). Defendant did not report having suffered any injuries and did not show any evidence of injury to the police or to his parole officer, Jerry

Dennis. (TT VI, 43, 72). Indeed, even his "affidavit," as detailed as it is, does not say anything about causing or receiving knife wounds, particularly to Defendant's hand; he says nothing about being further injured or about receiving medical attention from anyone. (See "Affidavit," Appendix 3). And defendant did not make a complaint about an assault of his own person during which Woodward allegedly cut him with a knife and broke one of his fingers.

Defendant did admit on cross-examination that after he allegedly pulled Woodward off of his daughter, he "probably" kicked and stomped on Woodward. (TT V, 90-92). He is sure that he beat Woodward with his fists and broke a lamp over Woodward's head. (Id.) Indeed, when asked if he beat Woodward with a shoe, defendant testified that "I don't know what all I beat him with." (TT V, 91). It was not irrational for the jury to find that any alleged threat of harm to the defendant or his family was not present or imminent and, even if so, the use of force by defendant was excessive or motivated by rage as opposed to a desire to provide protection.

The jury obviously believed Woodward's testimony and rejected defendant's version and his claim of self-defense. This would have been the case even in the absence of the MRE 404(b) evidence, as there was just no rational explanation for the cutting injuries suffered by Woodward. Thus, any error in admitting the evidence under MRE 404(b) would have been harmless and defendant's conviction should be affirmed.

RELIEF

WHEREFORE, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Michael A. Tesner, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal because the Court of Appeals did not err when affirming Defendant-Appellant's conviction and sentence.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

/s/ Michael A. Tesner
Michael A. Tesner (P 45599)
Assistant Prosecuting Attorney

DATED: February 23, 2017

STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURRAY, P.J., AND METER and OWENS, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TMANDO ALLEN DENSON,

Defendant-Appellant.
_____/

Supreme Court
No. 152916

Court of Appeals
No. 321200

Circuit Court
No. 15-032919-FH

APPENDIX

1. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200).

2. *People v Denson*, order of Michigan Supreme Court, issued June 22, 2016 (Docket No. 152916).

3. Defendant's "Judicial Notice" Affidavit/Statement of Facts; Complaint, dated October 23, 2012.

4. Circuit Court Opinion on Motion for New Trial entered October 15, 2014 (circuit court no. 13-032919-FH).

5. *People v Denson*, order of Michigan Supreme Court, issued November 23, 2016 (Docket No. 152916).

6. Photographs of the lacerations on Defendant's back (Exhibit 3), his right shoulder and arm (Exhibit 5), his left arm (Exhibit 8), and his right leg (Exhibit 4).